SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 781

CLAUDE L. KYLES,

Petitioner,

vs.

JAMES W. ELWELL & CO., a corporation, G. HEYN & SONS, and INTERSTATE CONTRACTING CORPORATION, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX TO PETITION

	PAGE
Opinion below	1
Grounds for invoking this court's jurisdiction	2
Question presented for review	2
Constitutional provisions and statutes involved	2
Statement of the case	3
Argument	
I. The lower courts are in conflict with each other on the question presented for review	4
II. The Supreme Court has not precisely decided the question presented for review	8

INDEX TO APPENDIX

Court of Appeal's opinion	1a
Court of Appeal's judgment	7a
Merchant Marine (Jones) Act	8a
Longshoremen's & Harbor Worker's Compensation Act	9a

TABLE OF CASES.

American Sugar Refining Co. v. Nassif, 45 Fed. (2) 321 (1930)	4
Arthur v. Compagnie General, 72 Fed. (2) 662	6
Bernardo v. Bethlehem Steel Co., 169 Fed. Supp. 914 (1959)	8
Braen v. Pfeifer, 263 Fed. (2) 147 (1959)	5
DeWald v. B. & O. Railroad, 71 Fed. (2) 810 (1934)	5
Gianfala v. The Texas Co., 350 U.S. 879 (1955)	5
Grimes v. Raymond, 245 F.(2) 437 (1957)	4

PAGE

Hammond Lumber Co. v. Sandin, 17 Fed. (2) 760 (1927) 7

Harris v. Whiteman, 243 Fed. (2) 563 (1957) 6

International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926) 8

Kawsizur v. Dawnie, 25 Fed. Supp. 327 (1938) 7

Kyles v. Elwell, 296 Fed. (2) 703 (1961) 7

McAfoos v. Canadian Pacific Steamship, 243 Fed. (2) 270 (1957) 5

Offshore Company, v. Robison, 266 Fed. (2) 769 (1959) 6

Orez v. American President Lines, 259 Fed (2) 636 (1958) 5

Panama Agencies v. Franco, 111 Fed. (2) 263 (1940).. 6

Pope & Talbot v. Hawn, 346 U.S. 406 (1953) 10

Puget Sound Co. v. Tax Commission, 302 U.S. 90 (1937) 10

Seas Shipping v. Sieracki, 328 U.S. 85 (1946) 9

Swanson v. Marra Bros., 328 U.S. 1 (1946) 9

The Enos, 24 Fed. Supp. 387 (1938) 8

The Texas Co. v. Gianfala, 272 Fed. (2) 382 6

Wilkes v. Mississippi River Sand & Gravel Co., 202 Fed. (2) 383 (1953) 7

W. J. McCahan v. Stoffel, 41 Fed. (2) 651 (1930) 5

STATUTES.

Longshoreman's & Harbor Worker's Compensation Act, 33 U.S.C.A. 901-942 (1927) 4, 8, 9

Merchant Marine (Jones) Act, Sec. 20; 46 U.S.C.A. sec. 688 ..... 3, 11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on December 8, 1961, which judgment dismissed petitioner-plaintiff's action for damages for personal injuries.

OPINION BELOW

The opinion of the Court of Appeals, set forth in the Appendix of this Petition at pages 1a-6a, is reported in 296 Fed. (2) 703.

GROUNDS FOR INVOKING THIS COURT'S JURISDICTION.

The opinion of the Court of Appeals was entered on December 8, 1961. The jurisdiction of this Court is invoked under 28 USC Sec. 1254 (1).

QUESTION PRESENTED FOR REVIEW.

Whether a stevedore may sue a ship owner for personal injuries sustained on board ship under the Merchant Marine (Jones) Act, Sec. 20, 46 USCA, Sec. 688.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

There are no constitutional provisions involved.

The two Federal Statutes involved are:

1. The Merchant Marine (Jones) Act, Sec. 20, 46 USCA, Sec. 688, is set forth on page 8a of the Appendix.

2. The pertinent portion of the Longshoremen's and Harbor Workers Act, 33 USCA 901, is set forth on page 9a of the Appendix.

STATEMENT OF THE CASE.

This action was brought in the District Court for the Northern District of Illinois, Eastern Division, for personal injuries sustained by plaintiff—a longshoreman—while working in the hold of a vessel on navigable waters, when a load of steel tipped and fell upon him.

The injury occurred on July 27, 1957, and the complaint was filed February 1, 1960. The complaint makes the owners of the vessel parties defendant and alleges that they maintained an unseaworthy ship, that they were guilty of various acts of negligence, failed to furnish plaintiff a reasonably safe place to work, and suit is brought not only for unseaworthiness, but directly under the Jones Act.

The Court sustained the motion for summary judgment filed by the ship owners. The motion proceeded on the theory that plaintiff's cause of action was barred by the Illinois Statute of Limitations because suit was not filed within two years from the date of the occurrence and that the longshoreman could not maintain his action under the Jones Act.

The basis for Federal jurisdiction in the District Court is its general jurisdiction of admiralty cases and its jurisdiction over actions brought under the Jones Act (Sec. 20, 46 USCA, Sec. 688).

REASONS FOR GRANTING THE WRIT.

I.

THE LOWER COURTS ARE IN CONFLICT WITH EACH OTHER ON THE QUESTION PRESENTED FOR REVIEW.

The Lower Courts, both Circuit and District, have and are rendering decisions in direct conflict with each other on the question whether a longshoreman—or harbor worker—may bring an action under the Jones Act for personal injuries sustained aboard ship.

As an example of the varied and opposite conclusions reached by the Lower Courts, and keeping in mind that the exclusive liability features of the Longshoremen's and Harbor Workers Act, 33 USCA 905, applies not only to longshoremen but also to harbor workers, we submit the following cases:

Circuit Courts.

First Circuit: In *Grimes* v. *Raymond*, 245 Fed. (2) 437 (1957), the Court held that a pile driver, a member of the Pile Drivers Union, who was injured while working on a Texas Tower, was NOT a seaman within the meaning of the Jones Act. The Supreme Court reversed and remanded in 356 US 252.

In *American Sugar Refining Co.* v. *Nassif*, 45 Fed. (2) 321 (1930), a laborer who was in the hold of a vessel unloading sugar was held to be a seaman within the meaning of the Jones Act.

Second Circuit: *Braen* v. *Pfeifer*, 263 Fed. (2) 147 (1959), held that a mate on a ship who was hurt while repairing another barge COULD NOT SUE under the Jones Act and was limited to the Longshoremen's and Harbor Worker's Compensation Act. The Supreme Court granted Certiorari in 395 US 952.

Oroz v. *American President Lines*, 259 Fed. (2) 636 (1958), held a longshoreman could NOT bring his action under the Jones Act. Certiorari was denied in 359 U.S. 908, but it appeared that the action had been filed five years late.

Yet, in *McAfoos* v. *Canadian Pacific Steamship*, 243 Fed. (2) 270 (1957), relief under the Jones Act was afforded a magician's assistant who had been employed on a ship as an entertainer.

Third Circuit: The case of *W. J. McCahan* v. *Stofel*, 41 Fed. (2) 651 (1930) held that a stevedore injured while unloading sugar from a ship, is a seaman with all his peculiar rights and immunities.

Fourth Circuit: *De Wald* v. *B. & O. Railroad*, 71 Fed. (2) 810 (1934) took the opposite view in stating that a bargeman who supervised the loading and unloading of cargo from barges to steamships and vice versa, was not a member of the crew.

Fifth Circuit: In *Gianfala* v. *The Texas Co.*, 350 US 879 (1955), the Supreme Court reversed a decision of the Fifth Circuit in

Texas Co. v. *Gianfala*, 222 Fed. (2) 382, which had refused to sustain a lower court judgment in favor of a driller who had been unloading tubing from a barge. The action of the Circuit Court in holding the driller to be a member of the drilling crew and not a member of the ship's crew was reversed by the Supreme Court and the judgment in the lower court was reinstated.

Harris v. *Whiteman*, 243 Fed. (2) 563 (1957), held that a laborer on an hourly wage basis who was working on a "dead" ship where no steam had been raised for a year and where there was no crew, was not a seaman under the Jones Act. However, the Supreme Court in *Butler* v. *Whiteman*, 356 US 271 (1958), reversed and remanded for trial.

The case of *Arthur* v. *Compagnie General*, 72 Fed. (2) 662 held that a stevedore could sue under the Jones Act.

Panama Agencies v. *Franco*, 111 Fed. (2) 263 (1940) also held that a stevedore is a seaman under the Jones Act.

The much discussed case of *Offshore Company* v. *Robison*, 266 Fed. (2) 769 (1959), contains a review of most of the cases on the subject and comes to the conclusion that it is the province of the jury to determine who are seamen under the Jones Act. This Fifth Circuit Court

permitted the jury to determine whether an oil field worker who was injured on a mobile drilling platform resting on the bottom of the Gulf of Mexico could bring his action under the Jones Act.

Sixth Circuit: In *Wilkes* v. *Mississippi River Sand & Gravel Co.*, 202 Fed. (2) 383 (1953), certain laborers who were injured on a dredge boat were given a right of action under the Jones Act. One Justice dissented.

Seventh Circuit: The prime example which we can quote from the Seventh Circuit is the instant case appealed from. *Kyles* v. *Elwell*, 296 Fed. (2) 703, where the Court refused to permit Claude Kyles, a stevedore, from pursuing his action under the Jones Act for injuries sustained while working in the hold of a vessel.

Ninth Circuit: The case of *Hammond Lumber Co.* v. *Sandin*, 17 Fed. (2) 760, although decided in 1927 about the time that the Longshoremen's Act became effective, held that a stevedore is a seaman under the meaning of the Jones Act.

District Courts.

The District Court for the Eastern District of Pennsylvania held that a stevedore was NOT a seaman within the meaning of the Jones Act. *Kwasizur* v. *Dawnic*, 25 Fed. Supp. 327 (1938).

The District Court for the Western District of Washington, Northern Division, held that a mechanic, car-

penter and handyman engaged to reconstruct a vessel prior to a voyage was NOT a seaman entitled to a lien for wages. *The Enos*, 24 Fed. Supp. 387 (1938).

The District Court for the Southern District of New York in the case of *Bernardo* v. *Bethlehem Steel Co.*, 169 Fed. Supp. 914 (1959), held that the question of whether a welder who had been paid workman's compensation under the New York Compensation Act could sue under the Jones Act for injuries sustained while working on a dry dock which was out of commission was one for the jury.

II.

THE SUPREME COURT HAS NOT PRECISELY DECIDED THE QUESTION PRESENTED FOR REVIEW.

The gist of the defense argument seems to be that the decision of the Supreme Court in *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50 (1926), that a stevedore can recover under the Jones Act, is no longer the law because the Longshoreman's and Harbor Workers Compensation Act, 33 USCA 901-942 (1927) gave a compensation remedy as the exclusive action which could be filed by a longshoreman for injuries sustained aboard ship.

Essentially, our point is this: we merely seek an opinion of this Court on the simple question of whether a longshoreman may sue a ship owner under the Jones Act for personal injuries sustained on board ship. At first blush it would appear that this question must have been decided many times. Yet, not since the *Haverty* decision has there been a clear-cut definite statement on this proposition.

Defendants contend that the Haverty opinion has been superseded by the Longshoremen's and Harbor Workers

Compensation Act, 33 USCA 901 (1927) and that now the question should be answered in the negative.

True, there have been opinions which seem to indicate an answer, but nowhere can we find a direct statement that a longshoreman may—or may not—proceed under the Jones' Act for shipboard injuries.

In 1946 the Supreme Court held that a longshoreman who received injuries "while working on a pier—on shore" could not file his suit under the Jones Act. *Swanson* v. *Marra Bros.*, 328 US 1.

On the very same day, the Supreme Court rendered its opinion in the case of *Seas Shipping* v. *Sieracki*, 328 U.S. 85, which directly gave a right of action in favor of a stevedore for injuries sustained because of the unseaworthiness of a vessel—this in spite of the exclusive provisions of the Longshoremen's and Harbor Workers Act. 33 USCA 905.

Although the *Sieracki* opinion does not specifically say so, we submit the language used there applies not only to the longshoreman's right to recover for unseaworthiness of the vessel, but the plain wording of the opinion unmistakably makes the Jones Act a remedy available to the longshoreman:

> "Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy which has been controlling, although the specific issue has varied from a question of admiralty jurisdiction to one of coverage under *statutory liability* within the admiralty field. It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and *statutory* protections, regardless of the fact that he is employed immediately by another

than the owner. For these purposes he is, in short, *a seaman because he is doing a seaman's work and incurring a seaman's hazards.* Moreover, to make the policy effective, his employer is brought within the liability which is peculiar to the employment relation to the extent that and because he also undertakes the service of the ship." (Emphasis Supplied) (pp. 99) 328 U.S. 85.

The *Sieracki* opinion is quoted at some length in *Pope & Talbot* v. *Hawn*, 346 U.S. 406 (1953) and the Court here came to the conclusion that Charles Hawn, a carpenter employed by an independent contractor, could sue the ship owner not only for unseaworthiness, but for its maritime tort, and the Court refused to permit defendant to avail itself of its defense of contributory negligence.

It is interesting to note that in the *Hawn* opinion both the concurring opinion of Mr. Justice Frankfurter (pg. 414), and the dissenting opinion of Justices Jackson, Reed and Burton (pg. 419) recognize that the Jones Act is being applied—although the majority opinion does not specifically say so—to afford the carpenter Charles Hawn, his recovery.

We would interpolate here that although Hawn was not a longshoreman, still he certainly must be considered a harbor worker under the plain language of the title Longshoremen's and Harbor Workers Act; and we respectfully submit that if the Court applied the Jones Act to this carpenter as a harbor worker, it must necessarily follow that our present plaintiff, Claude L. Kyles, a longshoreman, is also entitled to the same relief.

In a case not involving personal injuries, this Court has given a stevedoring company the benefit of the Jones Act, *Puget Sound Co.* v. *Tax Commission*, 302 US 90 (1937).

The Court stated on page 92 of the opinion: "The Longshoreman busied in the same task bears the same relation as the crew to the commerce that he serves. Indeed, for the purpose of the Merchant Marine Act (41 Stat. 988, 1007), a stevedore is a 'seaman'". Citing *International Stevedoring Co.* v. *Haverty*, 272 US 50.

CONCLUSION.

For the reasons cited in this Petition we respectfully pray that the Court grant its Writ of Certiorari.

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APPENDIX

COURT OF APPEALS OPINION.
296 F. (2) 703 (1961).

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 13380 SEPTEMBER TERM, 1961 SEPTEMBER SESSION, 1961

CLAUDE L. KYLES,
Plaintiff-Appellant,
v.
JAMES W. ELWELL & CO., a corporation, G. HEYN & SON:, and INTERSTATE CONTRACTING CORPORATION, a corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 8, 1961

Before HASTINGS, *Chief Judge*, CASTLE and SWYGERT, *Circuit Judges*.

SWYGERT, *Circuit Judge*. Plaintiff, Claude L. Kyles, brought suit against James W. Elwell & Company and G. Heyn & Sons, the berthing agent and owner, respectively, of the ship Bally Gally Head, for personal injuries. In the same suit he joined Interstate Contracting Corporation under a separate paragraph of complaint. Plaintiff alleges that during his employment as a longshoreman by Interstate a load of steel tipped while he was working in the hold of the ship on July 26, 1957, causing him to fall on the floor and from which fall he received serious and

permanent injuries. He further alleges the ship was at the time docked at a pier on a navigable waterway in Chicago.

Plaintiff alleges in Count I of his complaint, which was filed February 1, 1960, negligence on the part of Elwell and Heyn and bases his action on the Jones Act. (46 U.S.C. 688). He also complains of these defendants in Count II and alleges that the ship was unseaworthy. In Count III he alleges that he was not furnished a safe place to work by defendant Interstate and charges liability under the Jones Act.

The District Court granted the motion of defendants Elwell and Heyn for summary judgment and the motion of defendant Interstate to dismiss. This appeal followed.

Count I

Plaintiff contends that a longshoreman performing seaman's duties on board a ship in navigable waters is a seaman within the meaning of the Jones Act. He argues that until modern times members of the crew carried on the task of loading and unloading ships and only with the advent of large freighters and cargoes did it become necessary to engage longshoremen to carry on these operations. Among the cases plaintiff cites in support of his contention are *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 and *Pope & Talbot* v. *Hawn*, 346 U.S. 406.

In *Sieracki*, suit was brought against a shipowner by an employee of a stevedoring company for personal injuries which he received while loading the cargo. It is significant that Sieracki did not bring suit under the Jones Act but under the general maritime law. The Supreme Court held that a longshoreman who is performing a function essential to maritime service on board a ship must be accorded the same right as a seaman to sue for the ship's unseaworthiness. This decision is not questioned by defendants. However, plaintiff maintains that the language used by the Supreme Court in equating a longshoreman with a seaman for general maritime purposes may also be used

to equate a longshoreman with a seaman for Jones Act purposes.

On the same day that *Sieracki* was decided, the Supreme Court declined to follow its earlier decision in *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50, that a longshoreman performing the traditional duties of a seaman could sue his employer under the Jones Act. In *Swanson* v. *Marra Brothers, Inc.*, 328 U.S. 1, the Court held that a longshoreman injured while on a pier and engaged in loading cargo on a vessel had no right of recovery against his employer under the Jones Act. The Court interpreted the passage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, subsequent to its decision in *Haverty*, as an expression of Congressional intent in conflict with *Haverty*. In speaking of the Longshoremen's Act, Mr. Chief Justice Stone said, "The act thus excludes . . . stevedores not members of the crew who are injured on navigable waters from recovering under the Jones Act as interpreted by the *Haverty* case." In view of the doctrine expounded by *Swanson* that a longshoreman could not have recourse to the Jones Act in a suit against his employer, we fail to see how *Sieracki* is authority for allowing plaintiff to rely on the Jones Act in a suit against the shipowner who was *not* his employer. *Sieracki* does not abrogate the rule that the Jones Act applies only where the relationship of employer and employee exists. (*Continental Gas Co.* v. *Thorden Line*, 4 Cir., 186 F.2d 992).

Plaintiff also relies on *Pope & Talbot* v. *Hawn*, *supra*. In *Hawn* a carpenter, employed by an independent contractor, was injured while working on a ship on navigable waters in Pennsylvania. He brought suit based on diversity of citizenship in a federal district court alleging negligence and unseaworthiness. The negligence count was not founded on the Jones Act but was brought to recover as a business invitee for what is often described as "negligence of the ship." The Court held that the negligence action was rooted in federal maritime law and, consequently, the federal rule of comparative negligence rather

than the Pennsylvania rule of contributory negligence was properly applied.

Plaintiff cites language in the *Hawn* concurring opinion to the effect that the majority of the Court was allowing the plaintiff to have the alternative rights of an action for negligence which the Jones Act gives to crew members or unseaworthiness.

In our view, the Court did not imply that Hawn was a seaman for Jones Act purposes. The holding was that in this common law negligence action, since the injury occurred on navigable waters and the plaintiff was working on a ship, the injured longshoreman would be entitled to the same rights as a seaman for purposes of classifying the alleged injury as a maritime tort to which the Pennsylvania law of contributory negligence would be inapplicable. This is far removed from holding that Hawn was a seaman, *i.e.*, a member of the crew, for Jones Act purposes.

Cases cited by plaintiff, particularly *Offshore Co.* v. *Robison*, 5 Cir., 266 F.2d 769, in which it was left for the jury to decide whether crews of dredges, oil drilling vessels, and the like were seamen are not in point. We look to *Swanson* as the controlling precedent in determining that plaintiff was not a seaman within the meaning of the Jones Act.

Count II

Defendants Elwell and Heyn attacked Count II, based on unseaworthiness, because it was filed more than two years after the claim accrued. In support of his claim that the complaint was timely filed plaintiff cites *McAllister* v. *Magnolia*, 357 U.S. 221. In *McAllister* the Supreme Court held that when a seaman joins a count for unseaworthiness with a count based on the Jones Act the three-year Jones Act statute of limitation applies to both counts.

There is no statutory limitation period for the filing of a count based on unseaworthiness. However, the Illinois limitation on actions for personal injuries is two years.

(83 Ill. Rev. Stat. §15). When there is no statutory limitation period specified the courts are left with four choices according to Mr. Justice Brennan in *McAllister*: "(1) No period of limitations at all; (2) an arbitrary period applicable in all like cases; (3) the flexible but uncertain doctrine of laches; and (4) state statutes of limitations."

In *McAllister* the Court did not need to resort to the comparable state statute since the unseaworthiness count was of necessity joined with the count under the Jones Act. As pointed out by the Court, a shorter state statute should not force a plaintiff to bring his Jones Act action sooner than the federal law requires. However, in the instant case we have concluded that plaintiff has no valid Jones Act claim. Consequently, since he has no right to the Jones Act remedy, he has no right to its limitation period. Accordingly, we must look elsewhere in deciding what time limit to impose.

Although laches is the proper measure of limitation, as a rule-of-thumb federal courts will use the local limitation statute in deciding the question of inexcusable delay. *Oroz v. American President Lines, Ltd.*, 2 Cir., 259 F.2d 636. Absent an explanation of the delay in filing or extenuating circumstances, we hold that the District Court, while not bound by the Illinois two-year limitation period, properly considered it in determining that plaintiff inexcusably delayed the filing of his complaint.

Count III

Finally, in Count III, plaintiff attempts to recover from his employer under the Jones Act. In addition to the prohibition placed on such an action by *Swanson*, the very terms of the Longshoremen's Act clearly preclude plaintiff's action against Interstate.

Interstate has fully complied with the requirements of the Longshoremen's Act. Plaintiff applied for and received temporary total disability payments and an action for partial permanent disability is pending before the Bu-

reau of Employees' Compensation of the Longshoremen and Harbor Workers. 33 U.S.C. 905 provides in part, "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to . . . maintain an action at law or in admiralty for damages. . . ."

Interstate's insurance carrier has signed an affidavit stating that the provisions of the Longshoremen's Act have been complied with and that the insurer is willing to pay any further compensation to which plaintiff may be entitled as a result of the pending administrative proceedings. The Longshoremen's Act provides plaintiff's exclusive remedy against his employer. *Conzo* v. *Moore McCormack Lines, Inc.*, 114 F. Supp. 956.

AFFIRMED.

UNITED STATES COURT OF APPEALS

For The Seventh Circuit
Chicago 10, Illinois

Friday, December 8, 1961

Before

Hon. John S. Hastings, Chief Judge

Hon. Latham Castle, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

Claude L. Kyles, *Plaintiff-Appellant*, vs. James W. Elwell & Co., a corporation, G. Heyn & Sons, and Interstate Contracting Corporation, a corporation, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13380

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

MERCHANT MARINE (JONES) ACT, SECT. 20, 46 U.S.C.A. Sec. 688.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under the sections 907, 908 and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury. Mar. 4, 1927, c. 509, P. 4, 44 Stat. 1926.-33 U.S.C.A. 904.

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence or a fellow servant; nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. Mar. 4, 1927, c. 509, P. 5, 44 Stat. 1426.